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RCRA Redux: The Courts Revisit EPA's Latest Revisions to the Definition of "Solid Waste"

By Anthony B. Cavender*

For more than 30 years, the Environmental Protection Agency has made tenacious efforts to define all aspects of "solid waste," and it shows no sign of abating. The latest attempt to define this important regulatory term was only partially successful. The U.S. Court of Appeals for the District of Columbia issued another ruling on the EPA's ongoing project to define the term "solid waste" in the context of regulating the recycling of "hazardous secondary materials." The author of this article discusses the EPA's efforts and the court's decision.

The Environmental Protection Agency's ("EPA") tenacious effort to define all aspects of "solid waste" has lasted more than 30 years, and shows no sign of abating. The latest attempt to define this important regulatory term was only partially successful. The U.S. Court of Appeals for the District of Columbia ("D.C. Circuit") issued another ruling on the EPA's ongoing project to define the term "solid waste" in the context of regulating the recycling of "hazardous secondary materials." This decision, *American Petroleum Institute v. EPA*, rejected important components of the agency's latest effort to regulate these recyclable materials, whose management is a serious and ongoing concern for many industries.[1] EPA's efforts have been hampered by the statute's definition of "solid waste," which references not only garbage, refuse and sludge, but also "other discarded materials." The last phrase is sufficiently ambiguous in that it has posed considerable challenges to the agency when it confronts the issue of how to approach recycling operations, which can be a pretext for straightforward disposal operations which the law requires to be regulated. Accordingly, the agency has decided that it must carefully define "solid waste" so as to regulate only materials that are truly discarded while allowing legitimate recycling operations to proceed, consistent with the Resource Conservation and Recovery Act's ("RCRA") stated policy of promoting the recovery of materials that are valuable and need not be buried in landfills. As a result, EPA has not only defined "solid waste" in its RCRA rules, but has also made more than 30 exclusions to this definition. These exclusions are important because excluded

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[1] The decision is reported at 862 F. 3d 50 (2017).

materials are not, by definition, solid waste, and are therefore not subject to RCRA's stringent RCRA regulatory controls.

BACKGROUND

It has been a long-term project for EPA to reform, reduce, and relax the regulatory obstacles to the reclamation and recovery of valuable by-products generated by manufacturing and other industrial practices and operations, while also being vigilant to regulate true solid and hazardous waste management. On December 10, 2014, the Administrator of EPA signed the latest rule that revised the agency's regulatory definition of "solid waste," which is the lynchpin of EPA's authority to regulate the management of hazardous waste. The rule was published in the Federal Register on January 13, 2015.[2] This action reversed the modest regulatory actions taken by EPA in October 2008 to encourage the legitimate recycling of "hazardous secondary materials" that would otherwise be subject to EPA's very strict and complex RCRA Subtitle C hazardous waste rules. The agency stated that it revised the 2008 rules because it was concerned that the application of those rules would increase risk to human health and the environment from discarded hazardous secondary materials unless additional safeguards were added. The many conditions that EPA then placed on the 2008 recycling exclusions were made more prescriptive, to the extent that the conditions attending a proposed recycling activity are similar in scope and complexity to the rules that apply to permitted RCRA treatment, storage, and disposal facilities.

To place these changes in context, it may be helpful to briefly review the history of these rules.

The Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act of 1976,[3] as amended by the 1984 Hazardous and Solid Waste Amendments, sets forth criteria for the management of solid waste and hazardous waste and establishes strict requirements applicable to generators and transporters of hazardous waste and rigid operating and permit requirements for those who treat, store, or dispose of hazardous waste. RCRA also provides a framework for the handling of recycled materials, the management of used oil, and the regulation of thousands of underground storage tanks containing petroleum products or other regulated

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[2] *See* 80 Fed. Reg. 1694 (2015).

[3] 42 U.S. §§ 6901 *et seq*.

materials. Most of the states have been delegated the authority to execute these programs, subject to EPA oversight.[4]

EPA's First Regulatory Steps

RCRA's enactment in 1976 was accompanied by Congressional findings to the effect that the haphazard disposal of hazardous waste could present a danger to human health and the environment, and that the impact of the passage of the Clean Air Act in 1970 and the Clean Water Act in 1972 had created even more waste that needed to be handled carefully. According to a report of the House Committee on Interstate and Foreign Commerce, an estimated 30 to 35 million tons of hazardous waste were deposited on the ground every year, and those practices were largely unregulated. With these findings in mind, EPA was directed to promulgate, within 18 months of RCRA's enactment, rules which identified hazardous waste characteristics and listed particular hazardous wastes. This deadline was missed, and a citizen's suit was filed to force EPA to promulgate these rules. In *Illinois v. Costle*,[5] a federal district court established new deadlines for EPA. The court noted that "the issues are extremely complex, and the scope of the regulations is extensive."

On May 19, 1980, EPA promulgated the first major set of hazardous waste regulations, usually described as a "cradle to grave" management system.[6] These rules addressed the definition, identification and classification of solid and hazardous waste, established standards to govern the generation and transportation of hazardous waste, and provided "interim status standards" for existing (and grandfathered) facilities that treated, stored or disposed of hazardous waste. New RCRA regulated facilities were subjected to much more rigorous permitting and operational standards. The rules became effective on November 18, 1980. Over the years, the program has become ever more complex, but the 1980 rules remain the heart of the RCRA system.

EPA's Struggle to Define "Solid Waste"

The keystone of EPA's regulatory program is the agency's definition of "solid waste." A material cannot be a hazardous waste unless, first of all, it is a solid waste. A solid waste that exhibits one of the characteristics of a hazardous waste, or has been listed or otherwise defined as a hazardous waste, and is not

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[4] These state delegations are listed at 40 CFR Part 272.

[5] 12 ERC 1597 (D.D.C. 1979).

[6] *See* 45 Fed. Reg. 33084.

otherwise excluded from the definition of a hazardous waste, is a hazardous waste and is subject to EPA's hazardous waste management system.[7]

The statute itself defines "solid waste" as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility and other discarded material . . . ." "Hazardous waste" is defined as "a solid waste, or a combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may (a) cause or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating reversible illnesses; or (b) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of or otherwise managed."[8]

The regulatory definition of "solid waste" is pretty straightforward and limited to materials that are plainly discarded or thrown away. However, EPA has also been concerned with the scope of its authority to regulate "other discarded materials." The agency's initial 1980 definition of "solid waste" addressed this provision by including in the regulatory definition materials that were manufacturing and mining by-products and materials that "are sometimes discarded." This definition proved to be unworkable, but EPA was clearly worried about "sham" recycling operations that, in fact, created unpermitted hazardous waste disposal sites and other environmental problems.[9]

Accordingly, in 1985, EPA overhauled its definition of "solid waste" to include certain recycling activities—many of them arguably being routine operational procedures. Under the 1985 rule, materials are considered to be "solid waste" if they are discarded, abandoned, inherently waste-like, or recycled as described in the rule. Five categories of hazardous secondary materials, if they were recycled in a manner described in the rule, constituted a solid waste and also a hazardous waste. The 1985 rule also contained a few recycling exclusions: materials that were recycled by being reused as an ingredient or as an effective substitute for a commercial product, or returned to the original manufacturing process as a substitute for a raw material feedstock.

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[7] *See* 42 U.S.C. § 6903 (5) and 40 C.F.R. § 261.3(a).

[8] *See* 42 USC §§ 6903(27) and (5).

[9] Appendix A to the 1985 rulemaking defining solid waste is a list of "Damage Incidents Resulting from Recycling of Hazardous Wastes." *See* 50 Fed. Reg. 614 at 658–659 (1985).

LITIGATING THE DEFINITION OF "SOLID WASTE"

The 1987 American Mining Congress Decision

Over 30 years ago, in the celebrated case of *American Mining Congress v. United States Environmental Protection Agency*[10]—now known as "AMC 1"—the D.C. Circuit rejected EPA's initial attempt to regulate a common industry practice of directly recycling valuable "secondary materials" that are designated for further handling after the primary manufacturing or processing actions have been completed. EPA viewed this practice as a form of solid waste management that came within the agency's regulatory authority under the Resource Conservation and Recovery Act, and thus subjecting these practices to a much more stringent level of government regulation embodied in EPA's hazardous waste management rules. These initial rules were promulgated on January 4, 1985,[11] and had the effect, by amending the regulatory definition of "solid waste," by "establishing and defining the agency's authority to regulate secondary materials reinserted into an industry's ongoing production processes."[12] With respect to the petroleum refining industry, one of the petitioners that sought review of these rules, the court noted that refiners "gather up" hydrocarbons and materials which escape from a refinery's production vessels, and by means of a complex retrieval system, return them to appropriate parts of the refining process for reuse. However, under EPA's final rule, this reuse and recycling of materials was made subject to regulation under RCRA because these materials were classifiable as "solid waste." For the mining industry, which processes massive amounts of ore-laden material, it was important in an operational and economic sense that recovered and reprocessed ore be recovered, conserved and subjected to additional processing and refinement. However, under EPA's rule, these materials and their management would be solid waste and potentially hazardous waste.

After what the court described as a "mind-numbing journey" through RCRA and its "labyrinthine maze," the D.C. Circuit rejected this result, noting that the statute was clear in what it meant by "solid waste": "materials that are discarded by virtue of being disposed of, abandoned, or thrown away." Accordingly, the closed loop recycling at issue was not a process constituting disposal as envisioned by the statute. Therefore, by attempting to regulate in-process secondary materials as solid waste, the court held that agency was acting in contravention of the Congressional intent.

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[10] 824 F. 2d 1177 (1987).

[11] *See* 50 FR 614.

[12] *See AMC* at 824 F. 2d 1178.

However, the court merely granted the petitions for review; it did not vacate or remand these flawed rules to the agency, and EPA implemented the court's decision, not by re-examining its regulatory rationale that "reclamation equals discard," but by adding multiple regulatory exclusions to its definition of solid waste. For instance, the 2017 *API* court referenced a list compiled by EPA in 2007 which listed 32 separate regulatory exclusions from the definition of solid waste—meaning that these individual processes cannot be regulated under RCRA because they are not considered to be a form of solid waste.[13] It is against this backdrop of continuous regulatory tinkering and updating that the courts, primarily the D.C. Circuit, have had to judge EPA's fidelity to the plain text of the statute.

EPA issued a Notice of Proposal Rulemaking ("NPRM") in January 1988 which proposed a modest revision of these rules and restated EPA's narrow reading of the *AMC I* ruling.[14] After considerable prodding over the life of two presidential administrations, EPA finally completed its work on this 1988 proposal in the summer of 1994 by promulgating new exclusions to its definition of solid waste.[15] This regulatory response to *AMC I* provides that oil recovered from petroleum refinery operations, petroleum exploration and production activities, and incidental transportation activities is excluded from the regulatory definition of solid waste if it is subsequently inserted into the petroleum refining process prior to crude distillation and catalytic cracking. In effect, EPA thus recognized a "closed loop" recycling exception to its definition of discarded materials.

Later Cases Construing the Definition of "Solid Waste"

In 1990, the D.C. Circuit appeared to limit the central holding of *AMC I* in two important cases. In *American Petroleum Industry v. EPA*,[16] several environmental petitioners argued that certain EPA Land Ban Rules, insofar as they exempted K061 "slag residues" from the rules because of EPA's interpretation of *AMC I*, constituted an erroneous interpretation of RCRA. The court agreed, holding that these slag residues had become part of a waste disposal problem and could be regulated as solid and hazardous wastes. *AMC I* was distinguished; its "proper focus" was defined as being limited to the issue of regulating in-process secondary materials reused in ongoing operations.

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[13] *See* 76 FR 44094 at 44139.

[14] *See* 53 *Fed. Reg.* 519 (1988).

[15] *See* 59 *Fed. Reg.* 38536 (July 28, 1994).

[16] 906 F.2d 729 (D.C. Cir. 1990).

A few months later, in *American Mining Congress v. EPA* ("*AMC II*"),[17] the mining industry argued that EPA's attempt to relist six metal smelting wastes foundered on the fact that they had not been discarded, and under *AMC I*, they were not "solid wastes." The court disagreed, noting that these smelting wastes were produced when large volumes of process wastewater were handled in surface impoundments. *AMC I* was again interpreted as excluding from EPA's jurisdiction only those spent materials that were destined for immediate reuse in an ongoing production process. In both cases, the court considered the recycling activities under review to be part of the waste management process, which triggered their regulation as RCRA solid wastes.

Then, a few years later, the D.C. Circuit unexpectedly restated the central holding of *AMC I*. In *Association of Battery Recyclers, Inc. v. EPA*,[18] the court ruled that EPA's definition of "solid waste" contained in the new "Land Disposal Restrictions Phase IV Rule" was inconsistent with *AMC I*. This "land ban" rule addressed residual or secondary materials generated in mining and mineral processing operations, and EPA had taken the position that materials that are removed from a production process for storage and are not immediately reused were therefore discarded and could be regulated as solid waste. The *Battery Recyclers* court disagreed, holding that EPA had misread *AMC I*, and that the intervening *AMC II* and API I decisions had not eviscerated the core holding of *AMC I* that "discard" was to be given its normal, non-technical meaning.

This decision was followed by *Safe Food and Fertilizer, et al. v. EPA.*[19] EPA had issued a rule which determined that RCRA would not apply to recycled materials used to make zinc fertilizers, or to the resulting fertilizers themselves, provided certain handling, storage and reporting conditions were observed, and concentration levels for certain constituents fell below specified thresholds. If these conditions were followed, the recycled materials would not be viewed as being "discarded" and hence, not solid waste. The petitioners objected to these conditions, arguing that circuit precedent held that materials that are transferred from one firm to another must always be viewed as discarded material. The court disagreed, stating that the petitioners had "misread our cases." The *Safe Food and Fertilizer* court summarized the *AMC I* precedents as follows:

> We have held that the term 'discarded' cannot encompass materials that are destined for beneficial reuse or recycling in a continuous process by the generating industry itself. We have also held that materials destined

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[17] 907 F.2d 1179 (D.C. Cir. 1990).

[18] 208 F.3d 1047 (D.C. Cir. 2000).

[19] 350 F.3d 1263 (D.C. Cir. 2003).

> for future recycling by another industry may be considered "discarded;" the statutory definition does not preclude application of RCRA to such materials if they can reasonably be considered part of the waste disposal problem. But we have never said that RCRA compels the conclusion that material destined for recycling in another industry is necessarily 'discarded.' Although ordinary language seems inconsistent with treating immediate reuse within an industry's ongoing industrial process as a discard . . . the converse is not true.

EPA AGAIN REVISITS RECYCLING

In response to these decisions, in 2003 EPA proposed new revisions to the definition of solid waste.[20] EPA stated that the proposed revisions would be consistent with these rulings, and that EPA would "clarify in a regulatory context the concept of legitimate recycling." As EPA explained at the time, "Under RCRA, to be a hazardous waste a material must also be a solid waste. EPA's framework for determining whether a material is a solid waste is based on what the material is and how it is managed . . . For materials recycled, RCRA jurisdiction is complex and the history of legal decisions related to these definitions is extensive."

The October 2008 Rules

Five years later, EPA finally promulgated the rules it had proposed in 2003.[21] These rules added two new exclusions to the definition of solid waste to encourage increased recycling of valuable secondary materials, and made other changes as well.

More specifically, the October 2008 revisions added two general recycling exclusions to 40 CFR Section 261.4(a): Hazardous secondary materials that are generated and legitimately reclaimed by and under the control of the generator whose processes created these hazardous secondary materials, and hazardous secondary materials that are transferred to another company for legitimate off-site reclamation, provided that the comprehensive attendant conditions are observed and followed. These two exclusions, popularly known as the "generator-controlled exclusion" and the "transfer-based exclusion," became the 23rd and 24th exclusions to EPA's definition of "solid waste."[22] In addition, EPA promulgated new rules which established exacting standards and criteria for a new administrative procedure by which a generator could seek a "non-waste"

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[20] *See* 68 *Fed. Reg.* 61558.

[21] *See* 73 Fed. Reg. 64668 (October 30, 2008).

[22] A list of 32 regulatory actions that ameliorate the impact of the definition of solid waste was published by EPA in 2011 at 76 FR 44094 at 44139 (July 22, 2011).

determination, on a case-by-case basis, for hazardous secondary materials that were not already specifically excluded by rule. Also, new notification requirements were placed in the rules, and EPA codified in the rules what it meant by the term and concept of "legitimate recycling," a term that had hitherto been given meaning and substance by EPA memoranda and policy. Lastly, owners and operators of reclamation and intermediate facilities handling excluded hazardous secondary materials were obliged to comply with new financial responsibility requirements that would enable them to demonstrate their ability to dispose of any hazardous waste resulting from their recycling operations, as well as the costs of closing the facility. These rules were largely based on the existing financial responsibility rules that apply to the owners of RCRA-permitted or interim status.

The January 2015 Rules

The October 2008 rules generated considerable controversy in the environmental community, and following a change in administrations, EPA hastened to revisit their provisions. In January 2009, the Sierra Club filed an administrative petition with EPA requesting that the 2008 rules be repealed and that the implementation of the rule (whose effective date was December 29, 2008) be stayed. Among the issues raised by the Sierra Club were its objections to EPA's finding that the rule would have no adverse impacts on environmental justice communities or children's health. While EPA decided against repealing or staying the 2008 rule, it entered into a settlement agreement with the Sierra Club in which the Sierra Club agreed to withdraw its administrative petition if the agency addressed four issues in the petition, namely promulgating a regulatory definition of "contained," requiring notification before operating under an exclusion, define "legitimacy," and review the new "transfer-based exclusion." A proposed rule to revise the October 2008 rules was published on July 22, 2011 at 76 FR 44094. The proposed new rules were prompted by the "concerns raised by stakeholders about potential increases in risks to human health and the environment," and, as stated above, the final rules were published in January 2015.

Under the 2015 rules, EPA took the following actions:

1) amended the "generator-controlled exclusion;"
2) replaced the "transfer-based exclusion" with a new "verified recycler exclusion;"
3) established a new "remanufacturing exclusion" to permit the controlled reclamation of specifically listed solvents;
4) codified the agency's long-standing policy that hazardous secondary materials determined to have been "sham recycled" are automatically

considered to be discarded and solid waste;

5) changed the 2008 definition of "legitimate recycling;" and

6) substantially revised the procedures by which a solid waste variance or non-waste determination will be made.

These revisions to the rules satisfied EPA's obligations under the settlement agreement.

The 2015 rules considerably tightened the 2008 recycling exclusions. For example, the "generator-controlled" exclusion was revised by providing that the reclamation process must meet the revised definition of "legitimate recycling" and EPA substantially revised the "speculative accumulation" rule.[23] In addition, this exclusion mandated adherence to new recordkeeping requirements, expanded notification requirements, new emergency response and preparedness conditions, and hazardous secondary materials must be managed in units that satisfy the new "contained" definition. Much of the 2008 "transfer-based exclusion" was jettisoned, and generators who wish to take advantage of this exclusion will be obliged to use the services of a third party "verified recycler" that has obtained either a federal or state authorization and has proof of financial responsibility.[24] The new "remanufacturing exclusion" will permit the reclamation of specific hazardous secondary materials that are listed high-value solvents—these materials will not be considered to be solid wastes if they are processed in accordance with this rule. New notification requirements also apply to this new exclusion, and the remanufacturing facility must prepare and follow a satisfactory "remanufacturing plan," whose criteria are spelled out in the rule. In addition, these solvent reclamation facilities must adhere to complex and extraordinarily-detailed Clean Air Act emission control requirements that are modeled on the existing requirements applicable to certain RCRA-permitted or authorized units.[25]

In addition, EPA (a) added a provision that explicitly prohibits "sham recycling," which the agency defines as "recycling that is not legitimate as defined in the rule;"[26] (b) included a provision that the Administrator's decision whether to grant a petition seeking a variance from a material's classification as a "solid waste" that is being reclaimed by a verified recycler will depend on whether the reclamation or intermediate facility's petition addresses the "potential for risk to proximate populations from unpermitted releases . . . and

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[23] *See* revised 40 CFR 261.1(c)(8).

[24] *See* revised 40 CFR §§ 261.4(a)(23) and (24).

[25] *See* new 40 CFR 261.4(a)(27).

[26] *See* new 40 CFR §§ 261.2(b)(4) and (g).

must include consideration of potential cumulative risks from nearby stressors." This new provision appears to address some of the environmental justice concerns the agency has grappled with over the years;[27] (c) added that, any variance or non-waste determination will be effective for no more than 10 years—which is consistent with the length of a RCRA permit;[28] (d) stated the new definition of "contained" provides that a compliant unit must address "any potential risks of fires or explosions," which EPA states will make spent petroleum catalysts eligible for inclusion in the generator-controlled exclusion;[29] and (e) deferred, for the time being, a review of all pre-2008 recycling exclusions.

THE JULY 2017 RULING OF THE D.C. CIRCUIT

The court reviewed only four issues from EPA's 2015 rulemaking: the revision and expansion of the" legitimacy factors" EPA uses to police "sham recycling" operations that are in truth another way to dispose of discarded materials; making "spent catalysts" amenable to an exclusion from strict RCRA hazardous waste regulation; deferring for another time whether to subject all previous regulatory exclusions (of which there are more than 20) to the new 2015 conditions; and replacing the 2008 Transfer-based exclusion with the "Verified Recycler Exclusion."

In its opinion, the court (a) upheld most of EPA's new "legitimate recycling criteria," set forth at 40 C.F.R. § 260.43(a),[30] except for Factor 4 which the Court of Appeals held imposed unacceptably "draconian" conditions on recyclers; (b) vacated the Verified Recycler Exclusion set forth at 40 C.F.R. § 261.4(a)(24)[31] with some exceptions; (c) reinstated the 2008 "Transfer-based Exclusion" and vacated a recycling bar that affected spent catalysts. The arguments of the environmental petitioners were rejected, as was industry's argument, mistaken according to the Court of Appeals, that the legitimacy factors should also be vacated as to Used Oil Recycling. According to the court, all the parties agreed that some form of legitimate third party reclamation would be consistent with the statute, but EPA's new advance administrative approval requirements in the Verified Recycler Exclusion were not adequately

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[27] *See* new 40 CFR 260.31(d)(6).

[28] *See* new 40 CFR 260.33(d).

[29] The new definition of "contained" is located at 40 CFR 260.10.

[30] https://www.ecfr.gov/cgi-bin/text-idx?SID=f1af4d7aa546d340a59c98df057dfa46&node=40:26.0.1.1.1.3.1.13&rgn=div8.

[31] https://www.ecfr.gov/cgi-bin/text-idx?SID=77e67a5e0d111f49766e5ef25b0084b0&mc=true&node=se40.28.261_11&rgn=div8.

justified as required by the Administrative Procedure Act and many decisions of the D.C. Circuit.

As noted by Judge Tatel in his partial dissent, the court majority subjected EPA's revised 2015 recycling rules to "a level of scrutiny that conflicts with the Administrative Procedure Act's highly deferential standards of review and with principles governing judicial review of facial challenges to rules." Judge Tatel's critique certainly has merit; at first blush, it is difficult to see how any agency could satisfy the high standards of regulatory competence erected by the majority. However, the court was not working with a tabula rasa; as we have noted this is simply the latest in a long line of decisions by the D.C. Circuit reviewing the agency's efforts to define when the recycling of secondary materials amount to handling regulated forms of solid waste. The cases include *AMC 1*; *AMC II*, *API v EPA I*; *Battery Recyclers*; and *Safe Foods*. For example, the court notes that in the *API I* decision, "we hinted that such a rule (that recyclers cannot include hazardous material along for the ride) should reasonably avoid incidentally regulating oil-containing chemicals not caused by sham recycling and therefore not discarded." Again, in assessing "Factor 4 of the agency's new "sham recycling" rule, the court states the rule "imposes tasks tangential to disposal vel non (and thus tangential to EPA's authority) even when EPA has offered little reason to doubt a product's legitimacy." One of the tests employed by EPA in Factor 4 is not a "reasonable test for distinguishing products from wastes," citing *Safe Foods*.

Consequently, the Final Rule was upheld in part and vacated in part. Factor 3 was upheld; Factor 4 was vacated insofar as it applies to all hazardous secondary materials via Section 261.2(g); the new Verified Recycler Exclusion was vacated except for tis emergency containment requirements; and the former Transfer-Based Exclusion was reinstated. Because of that last action, EPA's decision to withdraw the exclusion for spent catalysts was vacated, subject to any new arguments the parties wish to make to the court.

WHAT ARE THE RESULTS OF THIS RULING?

The bulk of the new recycling/reclamation rules are now effective, subject of course, to additional litigation. These rules include:

- New and revised definitions of "facility," "hazardous secondary material," "contained," and "remanufacturing;"[32]
- Non-waste determination procedures;[33]

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[32] 40 CFR Section 260.10.

[33] 40 CFR Section 260.34.

- Notification requirements for hazardous secondary materials;[34]
- Legitimate recycling criteria—as revised by the court;[35]
- Definitions of materials "reclaimed" and "accumulated speculatively;"[36]
- New exclusions promulgated for material not considered solid waste, as revised by the court;[37]
- Financial Assurance requirements for owners and operators of facilities reclaiming hazardous secondary material;[38] and
- New standards applicable to remanufacturing units and equipment managing hazardous secondary material.[39]

It is possible that there will be additional litigation in this case. For one thing, the court's discussion of the uncertain regulatory status of spent catalysts included an invitation to the parties to file petitions for rehearing on this issue to give the court an opportunity to issue a clarifying opinion. In addition, the issues are so close and complex, and, as the majority's ruling was based on fairly narrow grounds, that petitions for rehearing may be filed in any event. Finally, the next issue to be determined is whether and when the new rules will be effective in states having delegated RCRA authority. Not all of the states have adopted either the 2008 or 2015 rules, and steps must be taken in these states to revise or modify their existing RCRA rules to incorporate these changes. Pursuant to RCRA, the new rules will be immediately effective in those few states that do not have a final RCRA delegation, but the complexity of the RCRA delegation program means that the determination of the status of these rules in the other states must proceed carefully on a state-by-state basis.

To paraphrase Justice Scalia, administrative law is not for the fainthearted.[40]

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[34] 40 CFR Section 260.42.

[35] 40 CFR Section 260.43.

[36] 40 CFR Section 261.1.

[37] 40 CFR Section 261.4(a).

[38] 40 CFR Section 261.140–151.

[39] 40 CFR Section 261.170–1089.

[40] *See* 38 Duke Law Journal 511 (1989).